STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLIFTON PAUL MOFFAT,

Defendant-Appellant.

UNPUBLISHED
April 6, 2006

No. 259365
Wexford Circuit Court
LC No. 03-007071-FC

Before: Kelly, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for first-degree premeditated murder, MCL 750.316. He was sentenced to life imprisonment without possibility of parole. We affirm.

Defendant first argues that the trial court erred in its voluntary manslaughter instruction. Specifically, defendant asserts that the court limited the jury to considering only the physical altercation immediately preceding the victim's death in determining whether adequate provocation existed, and that such a limitation was error. We disagree. "'This Court reviews de novo claims of instructional error.'" *People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005), quoting *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002).

Instructions for voluntary and involuntary manslaughter must be given, when a defendant is charged with murder, if such instructions are supported by a rational view of the evidence. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). Voluntary manslaughter consists of a defendant killing in the heat of passion, the passion being caused by adequate provocation, and there being no lapse of time during which a reasonable person could have controlled his or her passions. *Tierney*, *supra* at 714. "The degree of provocation required to mitigate a killing from murder to manslaughter 'is that which causes the defendant to act out of passion rather than reason.'" *Id*. at 714-715, quoting *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998), aff'd by equal division 461 Mich 992 (2000). For the provocation to be adequate, it must be "'that which would cause a reasonable person to lose control.'" *Tierney*, *supra* at 715, quoting *Sullivan*, *supra* at 518. "'The determination of what is reasonable provocation is a question of fact for the fact finder.' However, '[w]here, as a matter of law, no reasonable jury could find that the provocation was adequate, the court may exclude evidence of the provocation.'" *Id*.

In the present case, defendant argued that the jury should be permitted to consider evidence of all of the circumstances surrounding the killing in determining whether adequate provocation existed to mitigate it from murder to manslaughter, including defendant's knowledge of the victim's affair with defendant's wife. However, defendant testified at trial that he had learned of the affair some eleven months before the incident giving rise to this case. Given the enormous time lapse between the time defendant learned of the affair and the time the victim was killed, we believe that no reasonable jury could find that defendant's knowledge of the victim's affair, taken alone, was adequate provocation to mitigate the killing from murder to manslaughter. Pursuant to *Tierney*, *supra*, under these circumstances the court was entitled to exclude this evidence, as taken alone, from the jury's consideration of provocation.

While it might have been erroneous for the court to completely bar the jury from any consideration of the relationship between the complainant and defendant's wife in considering the question of provocation the court did not do so. In giving the jury instruction on voluntary manslaughter, the court did initially literally state "you may only consider the facts and circumstances of the physical altercation as you find them to be between the defendant and the [victim]." However, the court then went on in the next sentence immediately to clarify "[y]ou may not consider *in and of itself* the testimony and evidence regarding the alleged affair between [the victim] and the defendant's former wife" (emphasis added). Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id*. In the present case, reading the voluntary manslaughter jury instruction given by the court as a whole, it is clear that the court did not bar the jury from *any* consideration of the affair in making its determination regarding provocation, but rather barred the jury from considering the affair as the *only* evidence in making the determination. Thus, the court fairly presented the issue to be tried and sufficiently protected defendant's rights with regard to this matter.

Defendant next argues that the trial court erred when it gave the jury an aiding and abetting instruction because such an instruction was not supported by the evidence, and when it failed to give the jury a unanimity instruction. We disagree. "'This Court reviews de novo claims of instructional error.'" *Tierney*, *supra* at 714, quoting *Hall*, *supra* at 269. To the extent that defendant failed to preserve this issue for appellate review, review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant bases his argument as to the aiding and abetting instruction on the alleged testimony of the medical examiner that the victim died as a direct result of being run over by Chad Biehn, and of Biehn that defendant neither told him to run over the complainant nor knew that he was going to do so. This argument is without merit.

In the first place, the medical examiner did not testify that the victim's death was solely the result of his being driven over by Biehn. Rather, to the contrary, the medical examiner repeatedly stated that the death resulted from both the stab wounds inflicted by defendant and the crushing wounds caused by Biehn running over the victim. Defendant admitted that he was the one who inflicted the stab wounds on the victim. Biehn admitted that he was the one who ran over the victim. Based on this evidence, the jury could have found that both defendant and Biehn's actions ultimately resulted in the victim's death.

Further, the medical examiner also testified that both defendant's and Biehn's acts in and of themselves were sufficient to have caused the victim's death. Under this theory, as well, we conclude that the aiding and abetting instruction was supported by the evidence. "'To support a finding that a defendant aided and abetted a crime, the prosecutor must show that: (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement.'" *Carines*, *supra* at 757 (citation omitted). Moreover, "'[a]iding and abetting' describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime…." *Id*.

The evidence introduced in this case indicates that Biehn had no prior relationship with the victim, and that the only reason he was in Cadillac and present at the scene of the altercation was because defendant requested that he accompany him there. The evidence further indicates that during the drive to Cadillac, defendant told Biehn about the alleged affair between the victim and defendant's wife and told Biehn that they were going to Cadillac to give the victim "an ass kicking." The evidence additionally indicates that both defendant and Biehn were involved in beating and kicking the victim, and that defendant requested and obtained Biehn's knife with which he then stabbed the victim repeatedly.

In light of this evidence, we conclude that defendant's argument constitutes too narrow a reading of the facts. Defendant asserts that because he did not know that Biehn was going to run over the victim, and because he did not tell Biehn to do so or intend for him to do so, the aiding and abetting instruction was not supported by the facts. However, the evidence cited above could reasonably be considered as indicating that Biehn's running over of the victim was only the final action in a series of acts all undertaken with the objective of committing murder. In this regard, the jury could reasonably have concluded that defendant effectively communicated to Biehn that he wanted Biehn to help him kill the victim by his conduct before and during the altercation. Biehn would not have been in Cadillac, were it not for defendant asking him to accompany him there to hunt down the victim. Biehn had no relationship with the victim and no reason to kill him until defendant told him about the affair and advised him that they were going to Cadillac to beat the victim up. Further, were it not for defendant's acts of stabbing the victim repeatedly, the victim would not have been on the ground and incapacitated for Biehn to run over. Under these circumstances, the aiding and abetting instruction was supported by the evidence.

Defendant also argues that the trial court erred in failing to instruct the jury that in order to convict defendant of murder it need find unanimously either that defendant acted as the principal or that he acted as an aider and abettor. We disagree.

In *People v Smielewski*, 235 Mich App 196, 209; 596 NW2d 636 (1999), this Court found that where the prosecutor presents ample evidence to support sending a case to the jury under both the theory that the defendant was the principal and the theory that the defendant was guilty as an aider and abettor, a unanimity instruction is not required merely because the jury could find from the evidence that the defendant committed the charged offense as a principal or as an aider and abettor. "In our opinion, if each juror found that defendant committed the crime by either of

such means, each juror found that the defendant committed the crime . . . and the jury verdict is unanimous." *Id*.

In the present case, the prosecutor presented sufficient evidence for the case to be submitted to the jury under both the theory that defendant killed the vicitm and that defendant aided and abetted Biehn in the killing. Accordingly, pursuant to *Smielewski, supra*, the trial court did not commit plain error when it failed to instruct the jury that in order to convict defendant it had to agree unanimously as to whether defendant acted as the principal or as an aider and abettor. Indeed, such an instruction would have been contrary to the law.

Defendant also argues that he was denied the effective assistance of counsel. We disagree. A defendant bears the burden of overcoming the presumption that counsel was effective and must meet a two-pronged test to establish ineffective assistance of counsel. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must show that counsel's performance was deficient as measured against objective reasonableness under the circumstances according to prevailing professional norms. *Id*. at 687-688; *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). Second, the defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial, *Strickland, supra* at 687-688; *Pickens, supra* at 309, so that there is a reasonable probability that but for counsel's unprofessional error(s) the trial outcome would have been different, *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Moreover, constitutional error warranting reversal does not exist unless counsel's error was so serious that it resulted in a fundamentally unfair or unreliable trial. *Lockhart v Fretwell*, 506 US 364, 369-370; 113 S Ct 838; 122 L Ed 2d 180 (1993); *United States v Cronic*, 466 US 648, 658; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

Defendant first asserts that trial counsel was ineffective in electing to focus on a self-defense strategy rather than on the defense strategy of arguing that the victim's death was nothing more than manslaughter. We disagree.

The failure to present a particular defense, or a decision to employ one of several available defense strategies instead of another, does not, in and of itself, constitute ineffective assistance of counsel. *People v LaVearn*, 448 Mich 207, 212-216; 528 NW2d 721 (1995). Moreover, this Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). That a trial strategy does not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

In the present case, trial counsel was presented with two possible defenses: (1) self-defense and (2) that the victim's death constituted merely manslaughter. In light of the strong evidence against defendant, including defendant's own testimony admitting stabbing the victim repeatedly, both defenses were very weak. The defense of self-defense, however, offered the possibility of acquittal, while the defense of manslaughter did not. Under these circumstances, we conclude that defendant has failed to demonstrate that trial counsel's choice of strategy was unsound. Therefore, trial counsel's failure to focus on a manslaughter defense did not constitute ineffective assistance.

Defendant next argues that trial counsel was ineffective in failing to object to four photographs of the crime scene that contained a reflection of red lighting from the store sign. This argument, also, is without merit.

In order to meet the burden of demonstrating ineffective assistance, a defendant must not only prove that trial counsel's representation was somehow deficient, but also that but for this deficiency there is a reasonable probability that the trial outcome would have been different. *Toma, supra* at 302-303. In the present case, the jury was informed repeatedly that the photographs in question contained a red reflection, which was in fact from the store lighting on the wet parking lot, and that the pictures appeared to be bloodier than they actually were. Under these circumstances, regardless of the admissibility of the photographs in question, we conclude that defendant has failed to demonstrate that a reasonable probability exists that had trial counsel objected to the photographs the trial outcome would have been different. Therefore, trial counsel's failure to object to these photographs cannot form the basis of an ineffective assistance claim.

Defendant also asserts that trial counsel was ineffective when he failed to object to the prosecution's introduction of evidence that Biehn was testifying pursuant to a plea agreement. Specifically, defendant argues that by introducing testimony from Biehn that he agreed to testify truthfully regarding defendant's role in the killing in exchange for being given a lesser sentence, the prosecutor improperly vouched for Biehn's credibility, and that trial counsel was ineffective in failing to object to this prosecutorial misconduct. Again, however, this argument is without merit.

"Although the introduction of an accomplice witness' promise of truthfulness is not necessarily error, it is error mandating reversal if used by the prosecutor to suggest that the government has some special knowledge that the witness is testifying truthfully." *People v Rodriguez*, 251 Mich App 10, 33; 650 NW2d 96 (2002). In the present case, the prosecutor elicited brief testimony that Biehn was testifying pursuant to a plea agreement, and that this plea agreement required him to testify truthfully regarding defendant's role in the victim's death. There is nothing to support a conclusion that the prosecution was using this testimony to suggest that the government had some special knowledge that the witness was testifying truthfully. Accordingly, pursuant to *Rodriguez, supra*, this evidence was admissible and the introduction of this evidence did not constitute prosecutorial misconduct. This being the case, trial counsel was not ineffective in failing to object to this evidence. Counsel is not required to advocate a meritless position. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Finally, defendant asserts that the cumulative errors of trial counsel denied him the effective assistance of counsel. This argument also is without merit.

In order to reverse on grounds of cumulative error, there must be errors of consequence that are seriously prejudicial to the point that defendant was denied a fair trial. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001). Defendant has not identified any prejudicial error in this case and, absent the establishment of errors, there can be no cumulative effect of errors meriting reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (2000). Accordingly, defendant is not entitled to reversal of his convictions on the ground of ineffective assistance based on cumulative error.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Michael J. Talbot